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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

REPLY OF PETITIONER TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

BENNETT A. WEBSTER
BRUCE E. JOHNSON
ARTHUR E. GAMBLE
GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309

O. L. HOUTS
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether Federal Transportation Law pre-empts a state tort rule of liability without fault for interstate rail carriers hauling hazardous substances.

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ARGUMENT

The brief of the United States concludes that further review of this case is not warranted. Careful examination of the brief of the Solicitor General, however, reveals that certain of the positions expressed in the brief help explain why Federal preemption of state tort liability without fault in the rail industry is the correct rule. Three mistakes cause the brief of the Solicitor General to reach a faulty conclusion.

1. At page 5 the Solicitor General's brief correctly summarizes the purposes of the Federal Railroad Safety Act of 1970, 45 U.S.C. 421 et seq., and the Hazardous Materials Transportation Act, 49 U.S.C. 1801 et seq.: "The primary purposes of these acts are to establish uniform standards for safe rail operations, to assure the safe transportation of hazardous material in commerce, and to provide civil and criminal

penalties and other enforcement tools to encourage compliance." The Solicitor General's brief recognizes that the Federal Railroad Safety Act of 1970 allows states only: (1) to continue in force existing statutes and regulations until the Federal Railroad Administration adopts a regulation or requirement covering the subject matter; and (2) to enact a more stringent regulation or standard when necessary to eliminate an "essentially local safety hazard" but only if the state regulation or standard is not incompatible with any Federal law or regulation *and* does not create an undue burden on interstate commerce. 45 U.S.C. §434. The brief further recognizes that the Hazardous Materials Transportation Act preempts any requirement of a state that is inconsistent with any requirement of the Act or a regulation issued under the Act. 49 U.S.C. §1811(a).

However, the Solicitor General's brief misapprehends the intent of Congress in passing railroad safety regulations during the 1970's. The pervasive and preemptive authority of these acts is evident in the legislative history of the Federal Railroad Safety Act of 1970. 1970 U.S. Code Cong. & Ad. News, 4104. The Report of the House Committee on Interstate and Foreign Commerce shows that the Congress intended "... to promote safety in *all areas of railroad operations...*" Id., at 4104 (emphasis added). The Congress was acutely aware of the need for a *national* safety program, commenting on the prior lack of uniformity of the regulations of the various states. Id., at 4015. Noting that previous Federal safety statutes had been effective but were limited to "special types of railroad safety hazards," the Committee described the Federal Railroad Safety Act as "the most comprehensive rail safety legislation ever reported to the Congress." Id., at 4105, 4106.

Each of these predecessor safety statutes had been held preemptive. See *Gilvary* v. *Cayohoga Valley R.R.*, 292 U.S. 57 (1934) (Safety Appliance Act, 45 U.S.C. §§ 1-16); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (Boiler Inspection Act, 45 U.S.C. §§ 22-34); and *Erie R.R.* v. *People*, 233

U.S. 671 (1914) (Railroad Hours of Service Law, 45 U.S.C. §§ 61-64b). Expressly recognizing the preemptive nature of Congress' previous federal legislation, and borrowing certain of its provisions from the Natural Gas Pipeline Safety Act of 1968, the Committee stated that it "...does not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national system to a variety of enforcement in 50 different judicial and administrative systems." 1970 U.S. Code Cong. Ad. News 4109. Citing the interstate nature of the railroad industry, the Committee expressed its concern about multiple, conflicting requirements imposed by local jurisdictions:

> "The integral operating parts of these companies cross many state lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communications systems of a single company normally cross numerous state lines. *To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operations could well result in an undue burden on interstate commerce.*"

Id., at 4110-4111 (emphasis supplied).

While the Federal Railroad Safety Act of 1970 was generally patterned on the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1600 et seq., differing provisions were adopted due to the differing natures of the two industries being regulated. 1970 U.S. Code Cong. & Ad. News 4109-4110. In the case of the Natural Gas Pipeline Safety Act, Congress specifically provided that "[n]othing in this chapter shall affect the common law or statutory tort liability of any person." 49 U.S.C. 1677(b). The legislative history of the Natural Gas Pipeline Safety Act explains the Congressional intent in this regard:

> "This language is to assure that the tort liability of any person existing under common-law or statute will not be relieved by reason of this legislation or compliance with its provisions."

1968 U.S. Code Cong. & Ad. News 3223, 3239. In clear contrast the Congress did not enact any similar savings clause in the Federal Railroad Safety Act of 1970.

The Solicitor General's brief severely underplays the overwhelming desire of Congress during the 1970's to remove from the existing problems of the interstate rail industry the possibility of haphazard, non-uniform action by state agencies or courts designed to require or encourage railroad safety practices not mandated by Federal safety regulations, unless such state regulation was to eliminate an essentially local hazard and also did not burden interstate commerce. There are 218 pages of detailed safety regulations and standards involving every phase of railroad operations that have been enacted under the Federal Railroad Safety Act of 1970. 49 C.F.R. §§ 200-240. Five hundred and two pages of regulations have been enacted pertaining to transportation of hazardous materials. 49 C.F.R. §§ 174, 178-179. No person in this case has ever pointed to a state railroad safety standard or practice that concerns a subject not covered by the above Federal regulations or that was even violated by the Petitioner, Trustee of the property of the Chicago, Rock Island and Pacific Railroad Company. Nor has any person pointed to a state standard or practice designed to eliminate an essentially local hazard that is involved in this case or that the Petitioner Trustee violated.

2. Instead, the Iowa Supreme Court Rule imposing upon an interstate rail carrier state tort liability without fault has been rationalized as advantageous because it is expected to coerce rail carriers to develop some unspecified additional "safety technology". At page 4 of his brief, the Solicitor General quotes the Iowa Supreme Court's explanation of the regulatory effect of the Rule it had fashioned. (Pet. App. A 15):

> "Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments..."

This quote evidences action by several Iowa judges inexperienced in railroading that is designed to extract expenditure of scarce railroad industry resources to develop undefined safety practices for use in the State of Iowa and that are not mandated by federal regulations. One might ask, what "safety technology"? Must trains slow to 10 mph on main lines after entering and before leaving Iowa? Why should Iowa be permitted to induce the use in Iowa additional but undefined safety practices not shown to be designed to eliminate an essentially local safety hazard, not mandated by the Federal government for use in Minnesota or Missouri, and not required by Minnesota or Missouri to be used in those states?[1]

The Solicitor General's brief is logically inconsistent because at page 4 it sets out the Iowa Supreme Court's no fault liability rationale as including the regulatory effect on railroad safety that such a no-fault rule accomplishes, but at page 7, the brief approves preemption of punitive damages because of their regulatory effect on nuclear safety:

> "Since punitive damages do not compensate victims for damages suffered, they can only be understood as a means of inducing licensees to protect against future accidents. The award of such damages is thus inconsistent with the regulatory system—enforced by criminal and civil penalties—created by the Atomic Energy Act. 42 U.S.C. (Supp.V) 2271-2284."

Brief of the Solicitor General, page 7.

An important purpose and effect of the no-fault liability rule is to regulate rail safety with absolutely no showing that the

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[1] The Trustee would not have been liable without fault under state law if the propane had exploded in Minnesota, *Caril* v. *City of St. Paul*, 268 N.W.2d 908 (Minn. 1978), or in Missouri, *Pecan Shoppe etc.* v. *Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978).

regulation falls within the narrow avenues carved out under the Federal Railroad Safety Act of 1970 or the Hazardous Materials Transportation Act.

3. The brief of the Solicitor General blurs the distinction between a "right" and a "remedy". The Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act do not preempt the remedy of civil damages. That has never been an issue. Civil damages are a remedy for property damage such as that sustained by Respondent if caused by violation of a Federal safety regulation or standard or violation of a state safety regulation or standard falling within the narrow permissible exceptions contained in the Federal Acts. The fact that a Federal regulatory statute permits additional common law remedies, such as damages, is separate from the effect of the act in preempting state law on the question of determining when a litigant has the right to any remedy, whether it be a federal remedy or a state law remedy. *Chelentis* v. *Luckenbach, S.S.Co.*, 247 U.S. 372, 382-384, 62 L.Ed. 1171, 1176-1177, 38 S.Ct. 501 (1917).

CONCLUSION

The avowed purpose and the actual effect of the Iowa Supreme Court's no-fault liability rule is to regulate safety practices and safety development programs of rail carriers in interstate commerce. This form of state regulation falls outside the statutory exceptions of the Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act, and attempts to single out Iowa for receipt of special safety practices.[2] This form of state regulation of railroad safety is not permitted under the Federal Railroad Safety Act of 1970 and the Hazardous Materials Transportation Act.

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[2] The price of extra "safety technology" in Iowa will be paid to a large extent by interstate rail shippers outside Iowa, or by shareholders and bondholders of bankrupt rail carriers that follow the path of the Rock Island.

Respectfully submitted,

Bennett A. Webster
Bruce E. Johnson
Arthur E. Gamble
GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309

O. L. Houts
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD
COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604

Attorneys for Petitioner